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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD A. HECHENBERGER,
WILLIAM V. WILKEN,
and CHARLES W. RAMSEY,
Petitioners

vs.

WESTERN ELECTRIC CO., INC., and WESTERN ELECTRIC PLAN FOR EMPLOYEES' PENSIONS, DIABILITY BENEFITS AND DEATH BENEFITS, now also known in part as WESTERN ELECTRIC SICKNESS AND ACCIDENT DISABILITY BENEFIT PLAN, SOUTHWESTERN BELL TELEPHONE CO., INC. and SOUTHWESTERN BELL TELEPHONE PLAN FOR EMPLOYEES' PENSIONS, DISABILITY BENEFITS AND DEATH BENEFITS, now also known in part as SOUTHWESTERN BELL TELEPHONE SICKNESS AND ACCIDENT DISABILITY BENEFIT PLAN, and RICHARD ROUSSELOT, Director, Division of Workers' Compensation, State of Missouri,
Respondents

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-0145C(3)

Richard A. Hechenberger,
et al.,
Plaintiffs,

v.

Western Electric Co., Inc.,
et al.,
Defendants.

ORDER

(Filed August 22, 1983)

A memorandum dated this day is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that the motion of defendant Western Electric Company and defendant Western Electric Sickness and Accident Disability Benefit Plan for summary judgment be and the same is granted.

Dated this 22 day of August, 1983.

/s/ William L. Hungate
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-0145C(3)

Richard A. Hechenberger,
et al.,
Plaintiffs,

v.

Western Electric Co., Inc.,
et al.,
Defendants.

MEMORANDUM

(Filed August 22, 1983)

This matter is before the Court on the motion of defendants Western Electric Company, Inc., and the Western Electric Sickness and Accident Disability Benefit Plan (hereinafter collectively referred to as defendant Western Electric) for summary judgment dismissing the second amended complaint against them.

This is a suit arising under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132, with alleged ancillary jurisdiction under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a). The principal defendants are Western Electric Company, Inc., the Western Electric Sickness and Accident Disability Benefit Plan, Southwestern Bell Telephone Company, Inc., and the Southwestern Bell Telephone Sickness and Accident Disability Benefit Plan.

The Western Electric Sickness and Accident Disability Benefit Plan provides, among other things, for employee participants to receive payments on account of physical disability to work by reason of accidental injury arising out of and in the

course of employment by Western Electric. *See* Affidavit of J. E. Twomey, ¶ 3, and § 5 of Exh. 2, the Plan, attached thereto. Hechenberger filed a workers' compensation claim under the law of Missouri. At present, this claim is unresolved.

In this action, plaintiffs assert that Western Electric is improperly claiming an offset for the previous payments to plaintiff Hechenberger under the plan that were in excess of legally required workers' compensation healing period benefits. In Hechenberger's case, these excess payments may amount to more than $9,000.00; so, in effect, he would receive no payment for workers' compensation after the offset. This offset is said to violate ERISA. Plaintiff Hechenberger sues to recover the offset amount which he claims as a benefit under the plan.

On June 8, 1983, Plaintiff Hechenberger filed a motion to maintain a class action and for certification of the class. Plaintiffs seek to certify all other employees who are participants in defendants' employee benefit plans and who have had amounts received under workers' compensation awards offset by employee benefit plans. Plaintiff Hechenberger is the only named plaintiff who is an employee of defendant Western Electric and participant under its employee benefit plan (plaintiffs' second amended complaint, ¶ 2(a)).

Defendant Western Electric claims that its plan and practice is authorized by the Missouri Workers' Compensation Act, specifically, Mo. Rev. Stat. § 287.160.3, which provides:

> The employer shall be entitled to credit for wages paid to the employee or his dependents on account of the injury or death if such wages were not earned for work performed by the employee after the injury or death.

In further support of its contention, defendant Western Electric cites *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 516-17 (1981), approving its plan and practice of offset.

Plaintiffs claim that defendant Western Electric's plan and practice violates ERISA and that, to the extent Mo. Rev. Stat. § 287.160.3 authorizes the practice, it is preempted by ERISA.

Defendant Western Electric now moves for summary judgment against plaintiff Hechenberger's claim individually, and as a purported class member, claiming that it has never received any offset from plaintiff Hechenberger's workers' compensation claim and has no intention to offset any amounts in pending or future cases that are similar to plaintiff Hechenberger's.

In support of its motion, defendant Western Electric filed an affidavit of Michael McGuire. Mr. McGuire represented Western Electric before the Missouri Division of Workers' Compensation on several claims, including plaintiff Hechenberger's. In his affidavit, Mr. McGuire states that plaintiff Hechenberger never received an award from the Workers' Compensation Board. Mr. McGuire further states that, because plaintiff Hechenberger never received such an award, defendant Western Electric never sought an offset for payments made under its employee benefit plan.

Nowhere in Mr. Hechenberger's affidavit, filed in response to defendant Western Electric's motion for summary judgment, does he claim he either received benefits under the workers' compensation statute or was subject to defendant Western Electric's offset.

Thus, plaintiff Hechenberger's claim that defendant Western Electric's plan and practice of offset against Workers' compensation awards violates ERISA concerns no present controversy as to him individually.

When claims of the named plaintiffs are moot before class certification under Fed. R. Civ. P. 23(c)(1), dismissal of the action is required because there is no case or controversy between the parties under Article III of the Constitution. *Indianapolis School Commissioner v. Jacobs,* 420 U.S. 128, 129 (1975);

Sosna v. Iowa, 419 U.S. 393, 402 (1975); *Bishop v. Committee of Professional Ethics, etc.,* 686 F.2d 1278, 1283 (8th Cir. 1982); *Bradley v. Housing Authority of Kansas City, Mo.,* 512 F.2d 626, 628 (8th Cir. 1975). In particular, *Sosna* noted that the named plaintiff, throughout the course of the litigation, "must show that the threat of injury in a case . . . is 'real and immediate; not . . . hypothetical.' " *Sosna v. Iowa, supra* at 403 (citation omitted).

Plaintiff Hechenberger, in response to defendant Western Electric's motion for summary judgment, claims that, even if plaintiff's claims are moot, summary judgment is improper because other issues remain in the case. Plaintiff Hechenberger claims he is entitled to costs and attorney's fees because, by filing this suit and seeking class certification, he was successful in prompting defendant Western Electric to withdraw its practice of offset. Plaintiff further claims that to grant summary judgment at this stage of the proceeding would frustrate uniform national labor policy.

The Court finds that these contentions are without merit. The import of *Sosna* and *Jacobs* requires that summary judgment be granted, prior to class certification, if the named plaintiff's claim is not a matter of present controversy. Plaintiff Hechenberger is not precluded from asserting these claims in the future.

Plaintiff further argues that the doctrine of "relation-back" should preclude the granting of summary judgment. In *Sosna,* the Court noted that, even though a claim is moot prior to class certification, the certification could "relate back" to the filing of the complaint if the circumstances of the particular case required review of the underlying issues. *Sosna v. Iowa, supra* at 402 n.11.

However, in the instant case and in *Bradley, supra,* the issues would not evade review if the "relation-back" doctrine was not applied. In the affidavits of Mr. McGuire and Mr. John E.

Twomey, secretary of the employee benefit committee of Western Electric, both stated that defendant Western Electric would cease implementing the plan and practice of offset to all pending and future cases similar to plaintiff Hechenberger's.

In order to prevail on a motion for summary judgment, the burden is on the moving party to establish beyond controversy that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Roberts v. Browning,* 610 F.2d 528, 531-32 (8th Cir. 1979). This Court is required to view the facts in a light most favorable to the non-moving party and to give that party the benefit of reasonable inferences drawn from the underlying facts. *Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 153-59 (1970); *Goodman v. Parwatikar,* 570 F.2d 801, 803 (8th Cir. 1978). "Unless the pleadings and supporting documents disclose beyond any doubt the absence of a genuine issue of fact, summary judgment should not be entered." *Evans v. McDonnell Aircraft Corp.,* 395 F.2d 359, 362 (8th Cir. 1968).

There are no genuine issues of material fact regarding plaintiff Hechenberger's individual claim against defendant Western Electric. Because the named plaintiff's claim is not presently in controversy, defendant Western Electric's motion for summary judgment will be granted.

Dated this 22 day of August, 1983.

/s/ William L. Hungate
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-0145C(3)

William V. Wilken, et al.,
Plaintiffs,

v.

Southwestern Bell Telephone
Co., Inc., etc., et al.,
Defendants.

ORDER

(Filed October 17, 1983)

A memorandum dated this day is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that Southwestern Bell's general motion for summary judgment be and the same is granted.

IT IS HEREBY FURTHER ORDERED that defendant-intervenor Rousselot's motion for summary judgment be and the same is granted.

IT IS HEREBY FURTHER ORDERED that plaintiff's motion for class certification be and the same is denied as moot.

IT IS HEREBY FURTHER ORDERED that Southwestern Bell's motion for summary judgment on plaintiff Wilken's claims be and the same is denied as moot.

IT IS HEREBY ORDERED that this action be and the same is dismissed without prejudice, and the requirements of this Court's order of October 7, 1983, are rendered moot.

Dated this 17th day of October, 1983.

/s/ William L. Hungate
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 82-0145C(3)

William v. Wilken, et al.,
Plaintiffs,

v.

Southwestern Bell Telephone
Co., Inc., etc., et al.,
Defendants.

MEMORANDUM

(Filed October 17, 1983)

This matter is before the Court on the motion of defendants Southwestern Bell Telephone Company, Inc., and Southwestern Bell Telephone Sickness and Accident Disability Benefit Plan (hereinafter collectively referred to as "Southwestern Bell") for summary judgment; the motion of Southwestern Bell for summary judgment on plaintiff Wilken's claims specifically; the motion of intervenor-defendant Richard Rousselot for summary judgment; and plaintiffs' motion for class certification. The lawsuit arises under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132, with alleged ancillary jurisdiction under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a).

Plaintiffs Wilken and Ramsey are participants in Southwestern Bell's employee welfare benefit plan, which provides for payments to employee participants for physical disability to work due to accidental injury arising out of and in the course of employment by Southwestern Bell. Plaintiffs complain that defendants have improperly maintained a practice, in regard to employees who receive payments under the Missouri Workers' Compensation Law, Mo. Rev. Stat. §§

287.010, et seq., of integrating the plan's weekly benefit payments for absence paid in excess of that provided for healing period and absences provided under the Workers' Compensation Law, against the workers' claims for residual permanent injury. *See* Second Amended Complaint. Plaintiffs contend that this policy violates ERISA.

Originally, this action also contained claims by one Richard A. Hechenberger that a similar plan by Western Electric Company, Inc., and Western Electric Sickness and Accident Disability Benefit Plan (hereinafter collectively referred to as "Western Electric"), also violated ERISA. However, summary judgment was entered for Western Electric on August 22, 1983, on the basis of mootness; then-plaintiff Hechenberger had never received an award from the Workers' Compensation Board, and thus Western Electric never sought an offset for payments under its employee benefit plan. Additionally, Western Electric had filed affidavits stating that it would cease its offset practice as to all pending and future cases similar to Mr. Hechenberger's.

For similar reasons, the Court will grant Southwestern Bell's general motion and defendant Rousselot's motion for summary judgment. Neither of the two named plaintiffs has ever received an award from the Workers' Compensation Board. Consequently, no offset has been made. While defendants have concededly claimed entitlement to such an offset with respect to both plaintiffs, the issue has never become ripe. Plaintiff Ramsey's claim is still pending before the Workers' Compensation Board, and plaintiff Wilken's claim was withdrawn after he was informed of Southwestern Bell's intent to offset.

Furthermore, defendants have filed affidavits in support of their motion. Affiant James B. Kennedy, an attorney for Southwestern Bell Telephone Company, states that no formal hearing had been held on Mr. Ramsey's workers' compensation claim, and that he has advised the administrative law judge assigned to the case of his client's decision not to assert a claim

for excess payments during Mr. Ramsey's temporary total disability. Affiant also submitted a copy of the amended answer specifically stating that the credit would not be claimed.

Affiant Leo E. Eickhoff, Jr., also an attorney for Southwestern Bell, filed an affidavit stating that Southwestern Bell would not claim credit under Mo. Rev. Stat. § 287.160.3 against permanent partial awards or settlements in pending or future cases, for amounts paid to employees during a period of temporary total disability in excess of the statutory rate of compensation for temporary total disability. Affiant states that a letter to that effect, of which a copy is attached, was mailed to the Director of the Division of Workers' Compensation, with an effective date of August 26, 1983.

Intervenor-defendant Rousselot, the Director of the Division of Workers' Compensation, Department of Labor and Industrial Relations, State of Missouri, submitted his own affidavit along with his motion for summary judgment. He states that he received a letter from Mr. Eickhoff informing him of the decision to cease claiming offset credit, and that the legal advisors and administrative law judges had been informed of the "unconditional" change of position.

In accordance with the reasoning set forth in this Court's order of August 22, 1983, granting Western Electric's motion for summary judgment, the Court finds that the named plaintiffs' claims do not set forth a present controversy as to them individually. The action will therefore be dismissed.

Southwestern Bell's motion for summary judgment as to defendant Wilken and plaintiffs' motion for class certification are moot.

Dated this 17th day of October, 1983.

/s/ William L. Hungate
United States District Judge